

34545
SEC

SERVICE DATE - MARCH 15, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC. –
PETITION FOR DECLARATORY ORDER

MOTION FOR PROTECTIVE ORDER

Decided: March 12, 2004

On March 4, 2004, SMS Rail Service, Inc. (SMS) filed a petition for declaratory order to resolve an alleged dispute between Norfolk Southern Railway Company (NS) and SMS concerning SMS's common carrier status and the provision of rail service to SMS-served customers located within an industrial complex in Paulsboro, NJ.

In a motion filed on March 5, 2004, SMS seeks a protective order to govern discovery that SMS indicates it soon may initiate. SMS asserts that a protective order is necessary to facilitate discovery and the preparation of submissions to the Board by protecting the confidentiality of materials reflecting contract terms, shipper-specific traffic data, and other confidential and/or proprietary information. SMS states that the protective order it has proposed and the undertakings attached to its motion are similar to those in other recent cases, and that they are consistent with the requirements set forth in Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638 (STB served Apr. 3, 2003).

Good cause exists to grant SMS's motion. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material can cause serious competitive injury. Issuance of the requested protective order will ensure that material submitted or otherwise produced in response to discovery requests will be used only in connection with this proceeding and not for any other purpose. The motion conforms to the Board's rules governing requests for protective orders, 49 CFR 1104.14, and will be granted. The protective order and undertakings submitted by SMS will be adopted as modified in the Appendix to this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. SMS's motion for a protective order is granted. The protective order and undertakings in the Appendix to this decision are adopted.
2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Petition” means the Petition for Declaratory Order filed in STB Finance Docket No. 34483, in which SMS Rail Service, Inc. (SMS) seeks the entry of a declaratory order to terminate an alleged controversy between it and Norfolk Southern Railway Company (NS) concerning the status of SMS as a rail carrier in the receipt, or tender for transportation, of shipment consigned to, or shipped from, industries located within an industrial complex at Paulsboro, NJ.

(b) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(c) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, confidential financial and cost data, and other confidential or proprietary business information.

(d) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 5 or 6 of this Protective Order, and any Confidential Information contained in such materials.

(e) “Proceeding” means that proceeding before the Surface Transportation Board (Board) concerning the Petition for Declaratory Order in STB Finance Docket No. 34483, and any related proceedings before the Board, and any judicial review proceedings arising from STB Finance Docket No. 34483 or from any related proceedings before the Board.

2. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of SMS, NS, or their affiliates are held and carried out for purposes of this Proceeding, such meetings, conferences, exchanges of data, and other cooperative efforts are deemed essential for the conduct and disposition of such Proceeding and will not be deemed a violation of 49 U.S.C. 10907 or any other relevant provision of the ICC Termination Act of 1995 (“ICCTA”).

3. Upon conclusion of the Proceeding, all Confidential Documents (other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to this proceeding) that are exchanged between SMS and NS but which are not otherwise available to them pursuant to their reporting responsibilities for securities, tax and other

purposes, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents. With respect to parties other than SMS and NS, upon the termination of the Proceeding, all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to this Proceeding, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential Documents.

4. If any party to this Proceeding determines that any part of a discovery request or response, of a transcript of a deposition or hearing, or of a pleading or other paper filed or served in this Proceeding contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents “CONFIDENTIAL.” Any information or documents designated or stamped “CONFIDENTIAL” shall be handled as provided for hereinafter.

5. Any party producing material in discovery to another party to this Proceeding, or submitting material in pleadings or other documents filed or served, may in good faith designate and stamp particular Confidential Information, such as material containing shipper-specific rate or cost data or other competitively sensitive or proprietary information, “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped shall be handled as provided hereinafter.

6. Information and documents designated or stamped “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to this Proceeding, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

7. Information and documents designated or stamped “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any employee of a party to this Proceeding, or to any other person or entity except to an outside counsel or outside consultant to a party to this Proceeding, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Order.

8. Any party to this Proceeding may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenge(s).

9. Designated Material may not be used for any purposes other than this Proceeding, including without limitation any business, commercial, strategic, or competitive purpose.

10. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to this Proceeding) at the earlier of: (1) such time as the party receiving the materials withdraws from this Proceeding, or (2) the completion of this Proceeding, including any petitions for reconsideration, appeals, or remands.

11. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in this Proceeding except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

12. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than the Board in this Proceeding unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked “Confidential Materials Subject to Request for Protective Order” and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

13. No party may present or otherwise use any Designated Material at a Board hearing in this Proceeding, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

14. If any party intends to use any Designated Material in the course of any deposition in this Proceeding, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at

any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 11 of this Protective Order.

15. To the extent that materials reflecting Confidential Information are produced by a party in this Proceeding, and are held and/or used by the receiving person in compliance with paragraphs 1, 4, or 5 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 10907 or of any other relevant provision of the ICCTA.

16. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

17. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

18. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party's in-house counsel. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party's submission to the Board of its Highly Confidential Version) make available to outside counsel for any other party a list of all "highly confidential" information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

EXHIBIT A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on March 15, 2004, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 34483, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 34483, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with STB Finance Docket No. 34483 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicant or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signature

Dated: _____

EXHIBIT B

UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on March 15, 2004, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 34483, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 34483, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with STB Finance Docket No. 34483 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicant or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other

equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signature of Outside Counsel or Consultant

Dated: _____